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## ONLY THE NEWS THAT'S FIT TO PRINT: THE EFFECT OF *HAZELWOOD* ON THE FIRST AMENDMENT VIEWPOINT-NEUTRALITY REQUIREMENT IN PUBLIC SCHOOL-SPONSORED FORUMS

Janna J. Annest

*Abstract:* In *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court held that public school administrators can restrict expression in school-sponsored forums in a manner reasonably related to legitimate pedagogical concerns. Regulating First Amendment rights in any public forum usually requires that no point of view be suppressed in favor of its counterpoint, but the *Hazelwood* Court omitted the viewpoint-neutrality requirement from its holding. While the Sixth, Ninth and Eleventh Circuits continue to require viewpoint-neutral regulation of school-sponsored speech, the First and Third Circuits interpret *Hazelwood* as abrogating the viewpoint-neutrality requirement in school-sponsored forums. This Comment argues in favor of the interpretation advanced by the First and Third Circuits. First, the text of the *Hazelwood* opinions supports elimination of the viewpoint-neutrality requirement. Second, the tradition of judicial deference to local authorities in matters of school administration conflicts with a requirement of viewpoint-neutrality, and such a requirement would hinder the public school's ability to function as both an arm of state government and in loco parentis. Finally, abrogation of the viewpoint-neutrality requirement in public schools would avoid the doctrinal confusion associated with viewpoint and content-based restrictions.

A journalism class at a local high school plans to publish an article entitled "Education in Tolerance."<sup>1</sup> The article discusses homosexual awareness programs in schools throughout the country, the formation of "Queer Clubs," the meaning of symbols such as the pink triangle, and lists famous historical homosexuals. One student in the class believes that homosexuality is an unacceptable lifestyle choice and wishes to include another article in the same issue. This article details state anti-sodomy laws, includes Bible verses condemning homosexual acts, and presents statistics about the prevalence of AIDS in the gay community. Must the school publish the second article? According to the Sixth, Ninth and Eleventh Circuits, the answer is yes. If a school in these jurisdictions publishes an article that represents one point of view, it may not then exclude the opposing viewpoint.

In *Hazelwood School District v. Kuhlmeier*,<sup>2</sup> the United States Supreme Court addressed a First Amendment challenge to a high school

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1. Hypothetical adapted from *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1005-07 (9th Cir. 2000).

2. 484 U.S. 260 (1988).

principal's decision to remove two articles from the school's newspaper.<sup>3</sup> The Court held that a school may restrict expressive activities that might be perceived as bearing the imprimatur of the school,<sup>4</sup> so long as the restrictions are based on legitimate pedagogical concerns.<sup>5</sup> The *Hazelwood* Court initially applied the "public forum analysis" to the paper.<sup>6</sup> Under this analysis, any regulation of speech in a government-owned or sponsored forum must be viewpoint-neutral.<sup>7</sup> However, the Court did not complete its public forum analysis because it never analyzed the principal's decision for viewpoint-neutrality.<sup>8</sup>

While the First and Third Circuits have interpreted *Hazelwood's* omission of the viewpoint-neutrality requirement as eliminating this obligation in the public school context, the Sixth, Ninth and Eleventh Circuits have continued to require viewpoint-neutrality when schools regulate speech in school-sponsored forums. This Comment argues that the First and Third Circuits have advanced the more accurate interpretation of *Hazelwood*. This approach more closely reflects the text of the *Hazelwood* opinions. Further, eliminating the viewpoint-neutrality requirement is in alignment with the judicial tradition of deference to local authorities and reflects the historical function of school administrators. Finally, this approach allows courts to avoid the doctrinal difficulties associated with distinguishing permissible content-based regulations from impermissible viewpoint-based regulations.

Part I of this Comment provides an overview of public school First Amendment jurisprudence, including a discussion of the public forum doctrine and the distinction between content and viewpoint discrimination. It then traces the extent to which schools may inculcate particular values or viewpoints. Part II examines the *Hazelwood* majority and dissenting opinions. Part III reviews circuit court opinions interpreting *Hazelwood's* treatment of viewpoint-neutrality. Part IV argues that the text of the *Hazelwood* opinion, the tradition of judicial deference to local school authorities, and the realities of public school administration justify abrogating the viewpoint-neutrality requirement in public schools without unduly threatening students' First Amendment

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3. *Id.* at 262.

4. *Id.* at 271.

5. *Id.* at 273.

6. *Id.* at 267.

7. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *infra* notes 21–25 and accompanying text.

8. *Hazelwood*, 484 U.S. at 270.

rights. Part V concludes that based on these factors, the First and Third Circuits' interpretation of *Hazelwood* is superior.

## I. AN OVERVIEW OF PUBLIC SCHOOL FIRST AMENDMENT JURISPRUDENCE

### A. *Public Forum Doctrine and the Viewpoint/Content Neutrality Distinction*

Public forums are government-owned property used by individuals for expressive activity.<sup>9</sup> The U.S. Supreme Court has recognized three major categories of public forums.<sup>10</sup> First, "quintessential" public forums include places which have traditionally been used for assembly and communication, such as parks and town squares.<sup>11</sup> In these forums, restrictions on the content of expression must be narrowly drawn to further a compelling state interest and may not be based on the speaker's point of view.<sup>12</sup> Second, "voluntary" public forums are places which the government chooses to open to the public, such as theaters or school facilities.<sup>13</sup> Though not required to open the facility, once the government does so it is bound by the same laws that govern quintessential public forums.<sup>14</sup> However, if the government opens a voluntary public forum for a specific purpose, it can regulate expressive activity in keeping with that purpose.<sup>15</sup> Third, government-owned property that has neither traditionally been used for public expression nor designated for such use is a "nonpublic" forum.<sup>16</sup> The government may limit speech in these forums by reserving them for their intended purposes, as long as the

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9. *Perry*, 460 U.S. at 44–46.

10. *Id.* at 45–46.

11. *Id.* at 45 (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

12. *See id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

13. *Id.*

14. *Id.* at 46.

15. For instance, a municipal theater may not ban production of "Hair" because public theaters are dedicated to expressive activity, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), and persons may not be excluded from libraries for engaging in expressive activity that does not significantly depart from normal use, see *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

16. *Perry*, 460 U.S. at 45. This is something of a misnomer, because although the "nonpublic forum" is not generally open to the public for expressive activity, it refers to government-owned property and thus remains "public."

restrictions are reasonable and not intended to suppress a particular perspective.<sup>17</sup>

Even when no public forum is involved, nearly every First Amendment analysis requires a determination of whether the law in question is content-neutral or content-based.<sup>18</sup> The distinction between content-based and content-neutral regulations has been called "the most pervasively employed doctrine in the jurisprudence of free expression."<sup>19</sup> Further, while a finding of content discrimination may invite further analysis,<sup>20</sup> a finding of viewpoint discrimination terminates the inquiry and invalidates the law.<sup>21</sup> The constitutionality of a law restricting expression thus depends largely on its initial classification as an issue of either content or viewpoint.

Content-neutral laws are subject to an intermediate level of scrutiny,<sup>22</sup> and are permissible only if they further a significant government interest unrelated to the suppression of speech and the incidental restriction on expression is no greater than necessary.<sup>23</sup> Content-based laws are subject to strict scrutiny, meaning that the government can regulate the content of speech only if it promotes a compelling government interest and is the least restrictive means available.<sup>24</sup> Viewpoint-based regulations violate the First Amendment.<sup>25</sup> While the Supreme Court has offered examples of impermissible viewpoint restrictions,<sup>26</sup> it has not established a predictable border between viewpoint and content, or even defined viewpoint discrimination.<sup>27</sup>

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17. *Id.* For examples of nonpublic forums, see, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (airport terminals); *Cornelius v. NAACP Legal Def. and Educ. Fund.*, 473 U.S. 788, 805 (1985) (charitable fundraising drives in federal offices).

18. See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Free Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000).

19. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

20. See, e.g., *Boos v. Barry*, 485 U.S. 312, 319, 334 (1988) (deeming an ordinance prohibiting display of signs criticizing a foreign government within 500 feet of that government's embassy as viewpoint-neutral, but invalidated as not narrowly tailored to serve a compelling interest).

21. See Chemerinsky, *supra* note 18, at 56.

22. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

23. *Id.* at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

24. *Sable Communications v. FCC*, 492 US 115, 126 (1989).

25. See Chemerinsky, *supra* note 18, at 56. This Comment argues that *Hazelwood* created an exception to the viewpoint-neutrality rule for public schools. See *infra* Part IV.

26. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (holding that a state may not deny a license to a film because it advocates adultery under certain circumstances).

27. See Chemerinsky, *supra* note 18, at 59.

Classification of a law as viewpoint-based is certainly fatal,<sup>28</sup> but content-based laws survive in a number of circumstances, including: when they are intended to remedy the "secondary effects" of an expressive activity,<sup>29</sup> when the government demonstrates a sufficiently compelling reason and narrow tailoring of the law to achieve that interest,<sup>30</sup> or when the court applies a lenient level of scrutiny.<sup>31</sup> Courts can also avoid strict scrutiny by classifying a forum as nonpublic. Because nonpublic forums are subject to less stringent review, content-based restrictions in nonpublic forums may survive if they do not rise to the level of viewpoint discrimination.<sup>32</sup> In contrast, viewpoint discrimination is forbidden in all government-owned property, including nonpublic forums.<sup>33</sup>

Viewpoint and content are related concepts, but their relationship shifts from case to case. Although courts, including the U.S. Supreme Court, and commentators have described viewpoint as a form of content,<sup>34</sup> the Supreme Court has also treated them as distinct ideas.<sup>35</sup> Further, the point at which a content-based regulation ceases to affect an entire topic and becomes viewpoint-based—oppressing a specific point of view within that topic—remains unclear.

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28. See *id.* at 56.

29. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54–55 (1986) (upholding a zoning ordinance prohibiting adult theatres within 1,000 feet of residential zones, churches or schools based in part on the fact that the regulation was aimed at the secondary behaviors associated with such venues, not the content of the expression within theatres).

30. See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992) (holding that a law prohibiting solicitation of votes within 100 feet of polls survived strict scrutiny).

31. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 118 n.37 (1981).

32. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1981).

33. See Chermersky, *supra* note 18, at 56.

34. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("[v]iewpoint discrimination is . . . an egregious form of content discrimination"); Amy Sabrin, *Thinking About Content: Can it Play an Appropriate Role in Government Funding of the Arts?* 102 YALE L. J. 1209, 1221 ("[V]iewpoint is perhaps the most subjective element of content"); see also Chermersky, *supra* note 18, at 51 ("Phrased another way, the requirement that the government be content neutral in its regulation of speech means that the government must be both viewpoint-neutral and subject-matter neutral . . . . If a law is either a viewpoint or a subject-matter restriction it is deemed to be content based.").

35. See, e.g., *Consol. Edison Co. v. Pub. Ser. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 at 257 (1997) (O'Connor, J., dissenting) ("[W]hether a provision is viewpoint-neutral is irrelevant to the question whether it is also content-neutral.").

Justice Souter's concurring opinion in *Hill v. Colorado*<sup>36</sup> illustrates the difficulty of consistently applying the content and viewpoint labels. Justice Souter quoted Justice Kennedy's statement from *Ward v. Rock Against Racism*<sup>37</sup> that "[t]he principal inquiry in determining *content* neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the *message* it conveys."<sup>38</sup> Though Justice Souter also recognized subject and viewpoint as different ideas,<sup>39</sup> the use of this quote equates content with message, which implies promotion of an idea or point of view.<sup>40</sup> Justice Souter also observed that subject and viewpoint begin to merge when a regulation burdens behavior that represents one side of a controversy.<sup>41</sup> In addition, the Supreme Court has indicated that though all content discrimination is not viewpoint discrimination, all viewpoint discrimination is content discrimination.<sup>42</sup>

When the content of speech is easily distinguished from the speaker's viewpoint, the difference between content and viewpoint seems clear. The Court has explained that in nonpublic forums, a speaker may be excluded if his topic is outside the purpose of that forum, but may not be denied access "solely to suppress the point of view he espouses on an otherwise includible subject."<sup>43</sup> For example, if the topic is politics, Republicans and Democrats represent viewpoints within that topic. If a nonpublic forum is opened for the purpose of conducting a political debate, a Democratic speaker may not be denied if Republican speakers are admitted.

However, when a point of view represents a major philosophy, the distinction between content and viewpoint appears to collapse. The Court alluded to this phenomenon in the context of religion in *Rosenburger v. Rector and Visitors of the University of Virginia*.<sup>44</sup> The *Rosenburger*

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36. 530 U.S. 703, 736–37 (2000) (Souter, J., concurring).

37. 491 U.S. 781 (1989).

38. *Hill*, 530 U.S. at 736–37 (Souter, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added)).

39. *Id.*

40. As the terminology used by courts and commentators in this context is inconsistent, for the purposes of this Comment, the term "content" is synonymous with "topic," "subject," and "subject matter."

41. *Hill*, 530 U.S. at 736–37 (Souter, J., concurring).

42. *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also supra* note 34.

43. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

44. 515 U.S. 819.

Court acknowledged that the distinction between content and viewpoint was "not a precise one" in this circumstance, but classified religious "perspectives" as viewpoints.<sup>45</sup> Because the Court has not defined viewpoint discrimination,<sup>46</sup> the point at which a regulation burdens an entire topic rather than a viewpoint within that topic remains unclear.

The Court has further obscured the distinction between content and viewpoint by declining to fully explain its characterization of potentially viewpoint-based laws as viewpoint-neutral. In *Boos v. Barry*,<sup>47</sup> the Court described a law prohibiting signs criticizing a foreign government within five hundred feet of that government's embassy as viewpoint-neutral, because it banned all criticism of all foreign governments.<sup>48</sup> But, as one scholar has pointed out, exclusion of criticism in lieu of praise does in fact represent viewpoint discrimination.<sup>49</sup> In *NEA v. Finley*,<sup>50</sup> the Court found no viewpoint bias in a law requiring the National Endowment for the Arts to consider the "general standards of decency and respect for the diverse beliefs and values of the American public"<sup>51</sup> when allocating federal grants.<sup>52</sup> Although the Court stated that these standards do not constitute viewpoint discrimination,<sup>53</sup> one scholar has noted that these terms arguably inherently implicate viewpoint.<sup>54</sup> Finally, in *Arkansas Educational Televisions Commission v. Forbes*,<sup>55</sup> the Court denied that a minor candidate's exclusion from a debate on public television was viewpoint-based, explaining that the exclusion was based on his objective lack of support, rather than disagreement with his political platform.<sup>56</sup> Again, a scholar observed that viewpoint is the very essence of a political platform, and a minor candidate by definition represents a minority viewpoint.<sup>57</sup>

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45. *Id.* at 831.

46. See Chemerinsky, *supra* note 18, at 59.

47. 485 U.S. 312 (1988).

48. *Id.* at 319 (invalidating the law as content-based).

49. See generally Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 118-19 (1996).

50. 524 U.S. 569 (1998).

51. 20 U.S.C. § 954(d)(1) (1994).

52. *Finley*, 524 U.S. at 572-73.

53. *Id.* at 583.

54. Chemerinsky, *supra* note 18, at 58.

55. 523 U.S. 666 (1998).

56. *Id.* at 682.

57. Chemerinsky, *supra* note 18, at 57.



In the context of the public forum analysis, the threshold question is whether a regulation proscribes a particular viewpoint or merely an entire topic.<sup>58</sup> This inquiry often dictates whether the regulation will survive.<sup>59</sup> Despite the significance of this determination, the Court has not articulated a method for deciding when a regulation suppresses a point of view instead of a certain subject, and its application of the "viewpoint" label has been unpredictable.<sup>60</sup>

*B. The U.S. Supreme Court Endorses a Public School's Right to Indoctrinate Students According to Community Viewpoints*

The U.S. Supreme Court has consistently reinforced a public school's right to inculcate its students with values necessary to become productive citizens, even when that inculcation advances a particular perspective and excludes its counterpoint.<sup>61</sup> Unlike any other government entity, the public school is charged with two potentially incompatible tasks: encouraging diverse, independent thought while the instilling particular values that produce contributing members of the community.<sup>62</sup> The collision of these principles continues to redefine the line between appropriate indoctrination and unconstitutional censorship.<sup>63</sup> In order to fulfill its educational mandate, the school may choose not to tolerate<sup>64</sup> or sponsor speech that undermines its pedagogy.<sup>65</sup> Therefore, speech in school-sponsored forums is exempt from the full First Amendment protections available in other contexts.<sup>66</sup>

The school's daily custody of children in loco parentis further distinguishes it from other government facilities.<sup>67</sup> The fact that all American children must receive a state-approved education implicates

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58. See *supra* notes 18–21 and accompanying text.

59. See *supra* notes 21–31 and accompanying text.

60. See *supra* notes 44–57 and accompanying text.

61. See David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497–98 (1981).

62. See *id.* at 499–505; Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864–65 (1982).

63. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding mandatory flag salute unconstitutional).

64. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

65. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988).

66. *Id.* at 266, 271–72.

67. See, e.g., *Fraser*, 478 U.S. 675 at 684 (recognizing the "obvious concern on the part of . . . school authorities acting in loco parentis, to protect children . . . from exposure to sexually explicit, indecent or lewd speech").

the parental right to raise children free from undue state interference,<sup>68</sup> because the state's curriculum may not match parental notions of what children should learn. This tension between the state's need to educate productive citizens and the parents' right to raise their child finds some resolution in the local school board.<sup>69</sup> Parents retain the ultimate authority over what their children learn at school by electing those who make decisions governing schools.<sup>70</sup>

Since the early twentieth century, the Supreme Court has confirmed the state's power to compel attendance, make reasonable regulations, and prescribe curriculums for public schools.<sup>71</sup> For example, the Court has not questioned a school's right to prepare children for citizenship by inspiring patriotism, but a school cannot compel students to espouse any particular belief.<sup>72</sup> Early American public school laws reflected the founding fathers' belief that a successful democratic society presupposed an educated citizenry, and that in order to preserve itself, the state must indoctrinate the value of democracy and the republican form of government.<sup>73</sup> Throughout the nineteenth century, values such as honesty, obedience, patriotism, and democracy were typical in public school curricula.<sup>74</sup> In *Pierce v. Society of Sisters*,<sup>75</sup> the Court affirmed that "certain studies plainly essential to good citizenship must be taught."<sup>76</sup>

Although public schools' efforts to teach values have frequently generated controversy,<sup>77</sup> the Supreme Court continued to recognize the right of schools to promote certain core ideals.<sup>78</sup> In 1952, the Court

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68. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (calling the right to raise one's children "essential," a "basic civil right of man," and "[r]ights far more precious than property rights"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (noting the "power of parents to control the education of their own").

69. See *Diamond*, *supra* note 61, at 509.

70. The power of the state to vest such authority in the hands of parents was noted by a federal district court in Michigan and affirmed by the U.S. Supreme Court without opinion in *Mercer v. Michigan State Board of Education*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974).

71. *Meyer*, 262 U.S. at 402.

72. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

73. Susan H. Bitensky, *A Contemporary Proposal for Reconciling The Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 775 (1995).

74. *Id.*

75. 268 U.S. 510 (1925).

76. *Id.* at 534.

77. See Bitensky, *supra* note 73, at 776.

78. See *id.* at 824-25.

characterized teachers as “priests of democracy”<sup>79</sup> whose “special task”<sup>80</sup> was to “foster . . . habits of open-mindedness and critical inquiry which alone make for responsible citizens.”<sup>81</sup> Twenty years later, the Court observed that “[t]he importance of the public school in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests, long has been recognized by our decisions.”<sup>82</sup> In 1982, the Court maintained that “local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that there is a ‘legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’”<sup>83</sup> In *Bethel School District v. Fraser*,<sup>84</sup> the Court explained that “[public education] must inculcate the habits and manners of civility as . . . values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>85</sup>

The Supreme Court has permitted local school boards to determine which community values public school students should learn.<sup>86</sup> In 1943, the Court characterized the school board’s duties as “important, delicate, and highly discretionary,”<sup>87</sup> and fixed the limitations of the board’s discretion at the Bill of Rights.<sup>88</sup> The Court explicitly limited the judiciary’s role in school administration in *Epperson v. Arkansas*,<sup>89</sup> and affirmed that control over public schools is vested in state and local authorities.<sup>90</sup> Unless local actions threaten fundamental constitutional values, the Court will not intervene.<sup>91</sup>

In 1968, the Supreme Court opened the modern era of public school student speech jurisprudence. In *Tinker v. Des Moines Independent*

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79. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

80. *Id.*

81. *Id.*

82. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

83. *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982).

84. 478 U.S. 675 (1986).

85. *Id.* at 681.

86. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). These ideals or values frequently correspond with viewpoints. See Chemerinsky, *supra* note 18, at 58.

87. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

88. *Id.*

89. 393 U.S. 97 (1968).

90. *Id.* at 104–05.

91. *Id.*

*Community School District*,<sup>92</sup> a school district suspended students for wearing black armbands to class in protest of the Vietnam War.<sup>93</sup> The Court re-emphasized its tradition of deference to the plenary authority of states and local governments to regulate public schools, but noted that such regulation must conform to the Constitution.<sup>94</sup> In the absence of a "substantial disruption" to school activities, the Court held that students have a First Amendment right to demonstrate a political opinion.<sup>95</sup> The Court announced the broad rule that students do not "shed their constitutional rights . . . at the schoolhouse gate."<sup>96</sup> The Court recognized the first exception to *Tinker* in *Fraser*, holding that a school district may determine the appropriate manner of speech in classrooms and school assemblies.<sup>97</sup> The Court created a second exception for school-sponsored speech in *Hazelwood*.<sup>98</sup>

The uniquely local character of public schools underlies the Court's consistent deference to the judgment of local authorities in matters of free speech and school administration.<sup>99</sup> As Justice Powell observed, "no other single agency of government at any level is closer to the people whom it serves than the typical school board."<sup>100</sup> Parents' right to raise children according to their own beliefs and the role of the school in loco parentis also necessitates judicial latitude. The Court has therefore allowed a community's values to guide the education of its children.<sup>101</sup>

### *C. The Constitution Limits a School's Right to Inculcate Viewpoint*

A school official's right to make a viewpoint-based decision ends when the decision deprives an individual of his or her constitutional rights. In the context of a teacher's right to academic freedom,<sup>102</sup> the

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92. 393 U.S. 503 (1969).

93. *Id.* at 504.

94. *Id.* at 507.

95. *Id.* at 510–11.

96. *Id.* at 506.

97. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

98. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

99. *See Diamond*, *supra* note 61, at 506–09.

100. *Bd. of Educ., Island Trees Union Free Sch. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting).

101. *See, e.g., Pico*, 457 U.S. at 864.

102. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Though beyond the scope of this Comment, teachers do not have "unlimited liberty" to determine the content of their curriculum. *See Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975).

Supreme Court has said that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom,”<sup>103</sup> and has recognized that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>104</sup> Yet the point at which inculcation becomes deprivation has proven remarkably elusive, partially because the constitutionality of a decision often appears to depend upon the subjective motives of the decisionmaker.<sup>105</sup>

The Court’s decision in *Board of Education, Island Trees Union Free School District v. Pico*<sup>106</sup> represents the most sustained effort to articulate the distinction between inculcation and suppression and demonstrates the emphasis placed on the motive behind a regulation.<sup>107</sup> In *Pico*, a plurality of the Court determined that if a school district’s decision to remove certain books from the school library was based on their dislike of the ideas they contained, it violated the First Amendment.<sup>108</sup> The district deemed certain books such as Richard Wright’s *Black Boy* “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”<sup>109</sup> While respecting the broad discretion of school boards in managing school affairs,<sup>110</sup> the Court explained that they may not exercise their discretion in “a narrowly partisan or political manner” because “[o]ur Constitution does not permit the official suppression of *ideas*.”<sup>111</sup> The Court specifically limited its holding to prohibiting school boards from removing books from school libraries based on their dislike of ideas the books contained.<sup>112</sup>

In *Pico*, several Justices placed the intent of the school district at the heart of their opinions.<sup>113</sup> Justice Brennan explained that an all-white school board’s decision to remove all books written by black authors

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103. *Keyishian*, 385 U.S. at 603. The Court has invoked this language to reinforce the student’s right to be exposed to ideas and the teacher’s right to teach them and to buttress the judicial bias against contracting the spectrum of available knowledge. See *Pico*, 457 U.S. at 866–71.

104. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

105. See *Pico*, 457 U.S. at 871, 879.

106. 457 U.S. 853 (1982).

107. *Id.* at 861–62.

108. *Id.* at 871.

109. *Id.* at 857.

110. *Id.* at 864.

111. *Id.* at 863, 870–71 (emphasis in original).

112. *Id.* at 861–62. The Court stated that removal of books based on “educational suitability” would be permissible, but did not define the term. *Id.* at 871.

113. See *id.* at 871, 879 (Blackmun, J., concurring); *id.* at 907 (Rehnquist, J., dissenting).

would surely be unconstitutional as motivated by racial animus.<sup>114</sup> Justice Rehnquist's dissenting opinion similarly implied that the purpose of the removal is essential to determining its constitutionality.<sup>115</sup> The Court remanded the case for trial on the question of intent, instructing that if the board removed the books with the intention of denying access to a particular idea with which they disagreed, they had violated the Constitution.<sup>116</sup> If the removal decision was based on the board's understanding that the books were vulgar or educationally unsuitable, however, it would be "perfectly permissible."<sup>117</sup>

The public forum doctrine and underlying distinction between content- and viewpoint-based decisions constitute the doctrinal tools with which the Court shaped the *Hazelwood* opinion.<sup>118</sup> Recognizing the government's unique role as educator led the Court to support the right of schools to inculcate both the values of the state and the local community.<sup>119</sup> Although a school cannot deprive students of access to ideas simply because it disagrees with them, it can exercise broad discretion in determining curriculum content.<sup>120</sup>

## II. THE *HAZELWOOD* DECISION

Although the *Hazelwood* Court employed the public forum doctrine when determining the constitutionality of a principal's decision to remove articles from the school newspaper, it did not apply the viewpoint-neutrality requirement.<sup>121</sup> In *Hazelwood*, a high school principal excised two articles from the school newspaper, *Spectrum*.<sup>122</sup> One article described the experiences of three pregnant students.<sup>123</sup> The principal concluded that despite the use of false names, the identities of the students were intelligible and because the students' boyfriends and families had not consented, the article would invade their privacy.<sup>124</sup> He also believed that the references to sexual activity and birth control were

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114. *Id.* at 871.

115. *Id.* at 907.

116. *Id.* at 871.

117. *Id.*

118. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-76 (1988).

119. *See supra* notes 71-76 and accompanying text.

120. *See supra* notes 86-112 and accompanying text.

121. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

122. *Id.* at 263.

123. *Id.* at 266.

124. *Id.*

inappropriate in light of the age of the paper's intended audience.<sup>125</sup> The second article addressed the impact of divorce on students and included a quote from a named student criticizing her father's behavior.<sup>126</sup> The principal objected to this article because the father had not been offered the opportunity to respond.<sup>127</sup>

The *Hazelwood* Court recited *Tinker*'s teaching that students do not "shed their constitutional rights at the schoolhouse gate,"<sup>128</sup> but recognized that students' rights in public schools are not automatically coextensive with those of adults in other circumstances.<sup>129</sup> In spite of *Tinker*'s speech-protective holding, the Court in *Hazelwood* held that a school may restrict "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,"<sup>130</sup> so long as the restrictions are based on "legitimate pedagogical concerns."<sup>131</sup> While *Tinker* defined the extent to which a school must tolerate student speech, the *Hazelwood* Court distinguished the paper as a school-sponsored forum because of its place within a curriculum designed to convey information to student participants and audiences.<sup>132</sup> It then held that educators may exercise editorial control over school-sponsored expressive activities so long as their actions are "reasonably related to legitimate pedagogical concerns."<sup>133</sup>

In *Hazelwood*, the Court classified the paper within the public forum hierarchy.<sup>134</sup> The Court concluded that *Spectrum* was a nonpublic forum, because school officials demonstrated no intent to open its pages to general use by the journalism staff or the student body.<sup>135</sup> The Court determined that the lower court relied on equivocal evidence in finding *Spectrum* to be a public forum.<sup>136</sup> It then offered a different interpretation of the supervisory role of school officials, the degree of student authority, and the function of the paper in the school's curriculum, and

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 266 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986)).

130. *Id.* at 271.

131. *Id.* at 273.

132. *Id.* at 271.

133. *Id.* at 273.

134. *Id.* at 267.

135. *Id.* at 268-70.

136. *Id.* at 269.

found that those factors did not indicate any intent to create a public forum.<sup>137</sup>

The Court cited *Perry Education Ass'n v. Perry Local Educators' Ass'n*,<sup>138</sup> in which the Court classified internal school mail facilities as a nonpublic forum. The *Hazelwood* Court concluded that under *Perry*, the school had not "by policy or practice"<sup>139</sup> opened the paper to "indiscriminate use"<sup>140</sup> by the student journalists or by the student population, and had therefore reserved it for its intended curricular purpose of a "supervised learning experience."<sup>141</sup> The paper thus remained a nonpublic forum, subject to regulations reasonably related to legitimate pedagogical concerns.<sup>142</sup> Although public forum analysis usually includes an examination of viewpoint-neutrality,<sup>143</sup> the *Hazelwood* Court concluded its analysis without testing the principal's decision under this standard.<sup>144</sup>

Justice Brennan's dissenting opinion criticized the majority for licensing "thought control,"<sup>145</sup> enabling "camouflage[d] viewpoint discrimination,"<sup>146</sup> and approving of "brutal censorship."<sup>147</sup> He claimed that the majority opinion sanctioned "official censorship of student speech"<sup>148</sup> and accused the principal of striking the articles based on their viewpoint.<sup>149</sup> The *Tinker* Court, according to Justice Brennan, struck the appropriate balance between pedagogical direction and student expression.<sup>150</sup> Finally, Justice Brennan acknowledged that educators should have the authority to limit the "substantive scope" of a school

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137. *Id.*

138. 460 U.S. 37, 47 (1983).

139. *Hazelwood*, 484 U.S. at 270 (citing *Perry*, 460 U.S. at 47).

140. *Id.*

141. *Id.*

142. *Id.*

143. See *supra* note 16 and accompanying text.

144. *Hazelwood*, 484 U.S. at 270.

145. *Id.* at 286.

146. *Id.* at 288.

147. *Id.* at 289.

148. *Id.* at 287.

149. *Id.* at 288.

150. *Id.* at 280.



publication to a certain topic, such as sports or literary criticism,<sup>151</sup> but argued explicitly that viewpoint discrimination was unacceptable.<sup>152</sup>

### III. CIRCUIT COURT INTERPRETATIONS OF *HAZELWOOD*

Because the Supreme Court in *Hazelwood* did not explicitly consider viewpoint-neutrality in its holding, the circuits are in disagreement over whether nonpublic forums in public schools are subject to the same standards that govern regulation of expressive activity in other public forums.<sup>153</sup> The Eleventh, Ninth and Sixth Circuits have continued to require schools to be viewpoint-neutral when regulating speech in school-sponsored forums.<sup>154</sup> In contrast, the First and Third Circuits have interpreted the *Hazelwood* majority's omission of a viewpoint-neutrality requirement as announcing a new standard for regulation of school-sponsored speech.<sup>155</sup>

#### A. *The Eleventh, Ninth and Sixth Circuits Require Schools to be Viewpoint-Neutral under Hazelwood*

In 1989, the Eleventh Circuit became the first circuit court to interpret *Hazelwood* to require viewpoint-neutrality when public schools regulate school-sponsored speech. In *Searcey v. Harris*,<sup>156</sup> the Eleventh Circuit found no evidence that the *Hazelwood* majority intended to alter fundamental First Amendment principles by allowing school officials to discriminate based on viewpoint.<sup>157</sup> Rather, the Eleventh Circuit determined that the *Hazelwood* Court had acknowledged a school's ability to discriminate based on content.<sup>158</sup> In *Searcey*, a peace organization sought access to a high school's career day, but the school

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151. *Id.* at 287.

152. *Id.* at 286–87 (“The mere fact of school sponsorship does not . . . license such thought control in the high school, whether through school suppression of disfavored *viewpoints* or through official assessment of topic sensitivity. The former would constitute unabashed and unconstitutional *viewpoint* discrimination . . . . The State’s prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which *viewpoints* students may express on its pages, than the State’s prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiments within its gates.”) (emphasis added).

153. *See infra* Parts III.A and B.

154. *See infra* Part III.A.

155. *See infra* Part III.B.

156. 888 F.2d 1314 (11th Cir. 1989).

157. *Id.* at 1319.

158. *Id.*

board denied it access.<sup>159</sup> After the organization filed suit, the board adopted regulations governing admission to career day.<sup>160</sup> These regulations included a rule against participants' denigrating military careers or discouraging particular fields.<sup>161</sup> The Eleventh Circuit held that the presenters had a First Amendment right to offer valid and informative disadvantages of other careers,<sup>162</sup> despite the school board's argument that *Hazelwood* eliminated the requirement that a school's restrictions be viewpoint-neutral.<sup>163</sup>

The Eleventh Circuit considered the possibility that *Hazelwood* eliminated the viewpoint-neutrality requirement but decided that it did not alter the traditional nonpublic forum rule<sup>164</sup> as articulated in *Cornelius v. NAACP Legal Defense and Education Fund*.<sup>165</sup> In *Cornelius*, the U.S. Supreme Court had restated the familiar rule for regulation of speech in a government owned, nonpublic forum: restrictions based on subject matter are permissible, so long as they are reasonable and viewpoint-neutral.<sup>166</sup> In *Cornelius*, the Court upheld the exclusion of political and advocacy groups from an annual charitable fundraising drive conducted by federal employees in federal offices during working hours, based on the fact that the drive was a nonpublic forum and the exclusion was viewpoint-neutral.<sup>167</sup> The Eleventh Circuit determined that *Hazelwood* did not alter the *Cornelius* test.<sup>168</sup> Instead the court stated that *Cornelius* called for reasonableness and *Hazelwood* provided the context in which the reasonableness should be determined.<sup>169</sup>

The Ninth Circuit provided less explanation for its interpretation of *Hazelwood* in *Planned Parenthood of Southern Nevada v. Clark County School District*.<sup>170</sup> The court upheld a school's right to refuse to publish Planned Parenthood advertisements in its newspaper, yearbook, and athletic programs.<sup>171</sup> The Ninth Circuit reasoned that the exclusion was

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159. *Id.* at 1316.

160. *Id.* at 1317.

161. *Id.*

162. *Id.* at 1326.

163. *Id.* at 1319.

164. *Id.*

165. 473 U.S. 788, 806 (1985).

166. *Id.* at 806.

167. *Id.* at 811-13.

168. *Searcey*, 888 F.2d at 1319.

169. *Id.*

170. 941 F.2d 817 (9th Cir. 1991).

171. *Id.* at 830.

permissible because the school paper was a nonpublic forum and because the action was not an attempt at viewpoint discrimination.<sup>172</sup> The Ninth Circuit concluded that the school's action must be reasonable under *Hazelwood* and viewpoint-neutral under *Cornelius*.<sup>173</sup> Consequently, although the *Cornelius* rule for regulating nonpublic forums was unrelated to public schools, the Ninth Circuit applied it in *Planned Parenthood* and thereby added a viewpoint-neutrality requirement not mentioned by the *Hazelwood* Court.

The Ninth Circuit distinguished its *Planned Parenthood* holding from an earlier Ninth Circuit case, *San Diego Committee Against Registration and the Draft v. Governing Board of Grossmont Union High School District* [hereinafter *CARD*].<sup>174</sup> In *CARD*, the court held a high school's rejection of advertisements for a nonprofit organization promoting alternatives to military service while accepting military recruitment advertisements constituted viewpoint discrimination.<sup>175</sup> The Ninth Circuit reaffirmed that the school engaged in impermissible viewpoint discrimination by opening the school paper to advertisements but denying *CARD*'s, regardless of whether the newspaper was a limited public forum or a nonpublic forum.<sup>176</sup>

In *Planned Parenthood*, the Ninth Circuit distinguished the instant case from *CARD* because in *CARD*, the school proscribed a specific idea within the general category of presentations related to military service, while in *Planned Parenthood* the district banned the entire subject of "birth control products and information."<sup>177</sup> The *Planned Parenthood* court found that the paper and yearbook were nonpublic forums, and stated that the school's actions were permissible because they were "not an effort at viewpoint discrimination."<sup>178</sup> Presumably, if the Ninth Circuit had believed that excluding the *Planned Parenthood* ads suppressed a particular viewpoint, the school would have violated the First Amendment.<sup>179</sup>

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172. *Id.*

173. *Id.* at 829-30.

174. 790 F.2d 1471 (9th Cir. 1986).

175. *Id.* at 1481.

176. *Planned Parenthood of S. N.Y. v. Clark County Sch. Dist.*, 941 F.2d 817, 828 n.19 (9th Cir. 1991).

177. *Id.* at 829.

178. *Id.* at 830.

179. *Id.*

In 1999, the Sixth Circuit aligned with the Eleventh and Ninth Circuits. In *Kincaid v. Gibson*,<sup>180</sup> the Sixth Circuit interpreted the *Hazelwood* opinion as noting that since the school did not intentionally open the paper as a public forum, it remained nonpublic, and that schools may impose reasonable, non-viewpoint-based restrictions on speech in nonpublic forums.<sup>181</sup> Although the *Hazelwood* Court never addressed the issue of viewpoint-neutrality, the Sixth Circuit, without explanation, determined that *Hazelwood* required viewpoint-neutrality.<sup>182</sup> In *Kincaid*, Kentucky State University students alleged that the school's refusal to distribute the yearbook violated their First Amendment rights.<sup>183</sup> The Vice-President for Student Affairs disapproved of the yearbook's theme, "Destination Unknown," the inclusion of numerous pictures of political figures instead of people and events related to KSU, the lack of picture captions, and the decision to make the cover a color different than the school colors.<sup>184</sup> The Sixth Circuit held that under *Hazelwood*, the yearbook was a nonpublic forum and that confiscating it was reasonable in light of its failure to accomplish its intended purposes.<sup>185</sup> In sum, although the *Hazelwood* Court did not explicitly eliminate the viewpoint-neutrality requirement for regulation of speech in school-sponsored forums, three circuits have interpreted its omission as reaffirming the traditional standard of viewpoint-neutrality in nonpublic forums.

*B. The First and Third Circuits Interpret Hazelwood as Eliminating the Requirement of Viewpoint-Neutrality*

In 1993, the First Circuit became the first circuit court to interpret *Hazelwood* as having changed the standard for regulating nonpublic forums in public schools. In *Ward v. Hickey*,<sup>186</sup> a biology teacher alleged that she was denied reappointment because she conducted an in-class

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180. 191 F.3d 719 (6th Cir. 1999), *vacated and reheard*, 236 F.3d 342 (6th Cir. 2001). On rehearing, the Sixth Circuit explained that that *Hazelwood* is only of limited applicability to college newspapers as college papers are limited public forums, not nonpublic forums. *Id.* at 346 n.5. The Sixth Circuit did not criticize the manner in which the panel applied *Hazelwood*; rather, the court stated that the panel's error was in applying *Hazelwood* at all. *Id.*

181. *Id.* at 727 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).

182. *Id.*

183. *Id.* at 723.

184. *Id.*

185. *Id.* at 726–27.

186. 996 F.2d 448 (1st Cir. 1993).

discussion about abortion.<sup>187</sup> The teacher asserted a First Amendment right to discuss controversial issues in class.<sup>188</sup> A federal district court determined that under *Perry* retaliation was permissible as long as it was not viewpoint-based.<sup>189</sup> The First Circuit disagreed and held that under *Hazelwood*, the *Perry* rationale does not apply to teachers' classroom speech.<sup>190</sup> The First Circuit interpreted *Hazelwood* to mean that the First Amendment does not require regulations of school-sponsored speech to be viewpoint-neutral.<sup>191</sup> The court offered no justification for its understanding of *Hazelwood* beyond its plain reading of the text,<sup>192</sup> but affirmed the judgment in favor of the school on other grounds.<sup>193</sup>

In *C.H. v. Oliva*,<sup>194</sup> the Third Circuit aligned with the First Circuit and held that a student's First Amendment rights were not violated when a teacher prevented him from presenting religious material to his first grade class, because the restriction was reasonably related to a legitimate pedagogical concern under *Hazelwood*.<sup>195</sup> The student argued that under *Lamb's Chapel v. Center Moriches School District*<sup>196</sup> and *Rosenburger*, a school cannot prohibit religious viewpoints while permitting secular ones.<sup>197</sup> In *Lamb's Chapel*, the U.S. Supreme Court held that a school district could not refuse a church group access to school property after school hours because the group planned to offer parenting classes from a religious perspective.<sup>198</sup> Similarly, in *Rosenburger*, the Court found that

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187. *Id.* at 450. *Ward* involved a teacher's speech in the classroom, which the court noted as factually distinct from the student speech at issue in *Hazelwood*. *Id.* at 453. Nevertheless, the First Circuit observed that at least one other court had applied the *Hazelwood* test to teachers' classroom speech, and found the analogy appropriate because instructional statements made by a teacher are curricular, like the journalism class in *Hazelwood*, and like the school newspaper, the classroom was not a public forum. *See id.* at 453.

188. *Id.* at 450-51.

189. *Ward*, 996 F.2d at 454.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 456.

194. 195 F.3d 167 (3d Cir. 1999), *vacated and reheard en banc*, 226 F.3d 198 (2000). The Third Circuit affirmed the judgment of the district court regarding the events of plaintiff's first-grade year, which had given rise to the panel's discussion of *Hazelwood*. *Id.* at 203. The panel analysis of *Hazelwood* thus remains as persuasive authority on the circuit's position.

195. *Id.* at 174.

196. 508 U.S. 384, 385 (1993).

197. 195 F.3d at 173.

198. 508 U.S. at 394.

excluding a campus religious club from funding offered to all other extracurricular organizations violated the First Amendment.<sup>199</sup>

The Third Circuit rejected the comparison, noting that in both *Lamb's Chapel* and *Rosenburger*, the speech at issue was more appropriately characterized as "tolerated" (taking place on school grounds but not attributable to the school itself), as in *Tinker*, rather than school-sponsored, as in *Hazelwood*.<sup>200</sup> The Third Circuit confronted the question of whether *Hazelwood* required viewpoint-neutrality, and determined that it did not: "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint-neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns."<sup>201</sup> As an example, the Third Circuit explained that a school may have a legitimate pedagogical interest in suppressing speech that promotes alcohol use or endorses one side of a contentious political issue, and those actions may not be viewpoint-neutral.<sup>202</sup>

In sum, the First and Third Circuits have held that the traditional public forum analysis no longer applies when public schools regulate school-sponsored speech. The Third Circuit has even suggested that schools must be allowed to make viewpoint-based decisions to effectuate their legitimate pedagogical goals. In contrast, the Eleventh, Ninth and Sixth Circuits refused to excise such a fundamental tenet of First Amendment law without explicit direction from the U.S. Supreme Court.

#### IV. PUBLIC SCHOOLS SHOULD NOT BE REQUIRED TO REGULATE SCHOOL-SPONSORED SPEECH IN A VIEWPOINT-NEUTRAL MANNER UNDER *HAZELWOOD*

Under *Hazelwood*, public schools should not be required to maintain viewpoint-neutrality when regulating school-sponsored speech for legitimate pedagogical reasons. Taken together, the text of the *Hazelwood* opinions indicate that the U.S. Supreme Court did not intend to require viewpoint-neutral regulation of school-sponsored forums.<sup>203</sup> Abandoning the viewpoint-neutrality requirement in this narrow context preserves the school's ability to communicate fundamental social values.

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199. 515 U.S. 819, 845–46 (1995).

200. *Oliva*, 195 F.3d at 173.

201. *Id.* at 172–73.

202. *Id.* at 173.

203. See *infra* Part IV.A.

Further, this interpretation is consistent with courts' traditional deference to local school authorities and enables school boards to operate as local democratic units transmitting the community's values to children.<sup>204</sup>

Assuming that viewpoints often represent values, requiring school administrators to be viewpoint-neutral when choosing what speech to sponsor would signal a radical change in the nature of public education. Contrary to the beliefs of some circuit courts,<sup>205</sup> such an interpretation of *Hazelwood* does not require students to forfeit all First Amendment rights. After *Hazelwood*, schools may only restrict expression in school-sponsored forums if such restrictions are reasonably related to legitimate pedagogical concerns,<sup>206</sup> which eliminates the risk of school boards removing all but the most mainstream perspectives from its curriculum.

*A. Textual Evidence from Hazelwood Indicates the Court's Intent to Eliminate the Viewpoint-Neutrality Requirement*

Because the *Hazelwood* majority did not complete its analysis of the school newspaper as a nonpublic forum, it never addressed the issue of viewpoint-neutrality. Although the public forum doctrine usually requires courts to determine whether a regulation suppresses a particular viewpoint, the *Hazelwood* majority's truncated application of the public forum analysis indicates that it intended to eliminate the viewpoint-neutrality requirement in public school-sponsored forums.<sup>207</sup> The *Hazelwood* Court initially distinguished situations in which a school sponsors student speech from situations in which a school tolerates individual student speech on school grounds.<sup>208</sup> The Court then examined the principal's decision to remove the articles for reasonableness.<sup>209</sup> If the Court intended to impose standard nonpublic forum strictures on public schools, the principal's actions would have been analyzed for evidence of viewpoint-neutrality instead of simply for reasonableness.<sup>210</sup> The Court's unexplained abandonment of traditional public forum analysis suggests recognition of a new category—public school nonpublic forums—in which educators may control speech in school-sponsored

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204. See *supra* notes 61–101 and accompanying text.

205. See *infra* Part IV.E.

206. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

207. See *supra* notes 134–144.

208. *Hazelwood*, 484 U.S. at 270–71.

209. *Id.* at 274.

210. See *supra* note 144 and accompanying text.

expressive activities so long as their actions are “reasonably related to legitimate pedagogical concerns.”<sup>211</sup>

The *Hazelwood* Court’s use of viewpoint-based examples to demonstrate circumstances in which a school must control student expression in order to further its educational goals indicates that the majority intended to create a new, non-viewpoint-neutral standard for regulation of school-sponsored speech.<sup>212</sup> For instance, the Court authorized the school to refuse to sponsor student speech that may appear to advocate drug or alcohol use, irresponsible sex, or “conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”<sup>213</sup> Debates surrounding legalization of marijuana or lowering the drinking age may involve viewpoints with which a school may choose to dissociate itself, and “shared values” almost necessarily implicate viewpoint.<sup>214</sup> Further, the Court observed that the dissenting opinion’s approach could encourage many schools to shut down papers altogether rather than be forced to print things that are “sexually explicit, racially intemperate, or personally insulting,”<sup>215</sup> which implies that schools would be unable to promote even the most universal viewpoint unless it agreed to publish its counterpoint.

The dissenting opinion in *Hazelwood* provides further evidence of the majority’s intention to abolish the viewpoint-neutrality requirement. Criticizing the majority, Justice Brennan spoke repeatedly in terms of viewpoint.<sup>216</sup> The dissent’s concession that schools can regulate the *content* of school-sponsored speech<sup>217</sup> suggests that the majority holding must have been more speech-restrictive, specifically, legitimizing not only content, but viewpoint discrimination as well. Justice Brennan illustrated the unconstitutionality of viewpoint discrimination<sup>218</sup> and stated that school sponsorship does not legitimize “suppression of disfavored viewpoints”<sup>219</sup> because such discrimination violates the constitution. Had Justice Brennan interpreted the majority opinion as upholding the viewpoint-neutrality requirement, a demonstration of the

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211. *Hazelwood*, 484 U.S. at 273.

212. *Id.* at 272.

213. *Id.* (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

214. See Chemerinsky, *supra* note 18, at 58; Diamond, *supra* note 61, at 496–99.

215. *Hazelwood*, 484 U.S. at 276 n.9.

216. See *supra* notes 145–152 and accompanying text.

217. *Hazelwood*, 484 U.S. at 287 (emphasis added).

218. *Id.*

219. *Id.* at 286–87.



unconstitutionality of viewpoint discrimination would not have been necessary.

In conclusion, *Hazelwood* omitted the viewpoint-neutrality requirement from its analysis of *Spectrum* under the public forum doctrine, but the dissent spoke clearly in terms of viewpoint. The dissent's attention to the unconstitutionality of viewpoint discrimination indicates Justice Brennan's belief that the majority intended to dispense with viewpoint-neutrality in public school nonpublic forums. The Court's decision to use viewpoint-based examples to illustrate situations in which schools must foreclose expression to further its educational goals indicates the Court's implicit acknowledgment of the need to treat public schools differently than other public forums.

*B. The Sixth, Ninth and Eleventh Circuits Misinterpreted Hazelwood as Upholding the Viewpoint-Neutrality Requirement for Nonpublic Forums in Public Schools*

The *Kincaid*, *Planned Parenthood*, and *Searcey* courts included a viewpoint-neutrality requirement when they restated the holding of *Hazelwood*,<sup>220</sup> even though the *Hazelwood* Court itself did not include such a requirement.<sup>221</sup> This interpretation of *Hazelwood* finds no support in the text of the *Hazelwood* opinion.<sup>222</sup> Further, the Ninth and Eleventh Circuits have failed to acknowledge that public schools are fundamentally different than other government property, and that the traditional public forum analysis—specifically, its requirement of viewpoint-neutrality—is inappropriate in the public school context.

In *Kincaid*, the Sixth Circuit introduced *Hazelwood* with the following statement: “[t]he Court in *Hazelwood* noted, however, that if the school did not intentionally create a public forum, then the publication remains a nonpublic forum, and school officials may impose any reasonable, non-viewpoint-based restriction on student speech exhibited therein.”<sup>223</sup> It is grammatically unclear whether the *Kincaid* court intended to attribute both of these conclusions to the *Hazelwood* court, or only the statement that the paper remained a nonpublic forum. If the *Kincaid* court intended to credit *Hazelwood* for the entire sentence, it misread the *Hazelwood*

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220. See *supra* notes 168, 173 and 182 and accompanying text.

221. *Hazelwood*, 484 U.S. at 270.

222. *Id.*

223. *Kincaid v. Gibson*, 191 F.3d 719, 727 (9th Cir. 1999).

opinion, because the majority made no mention of viewpoint-neutrality.<sup>224</sup> If the *Kincaid* court only intended to cite *Hazelwood's* conclusion that the paper was a nonpublic forum and added the viewpoint-neutrality gloss itself, it assumed that the *Hazelwood* court intended to include a viewpoint-neutrality requirement, though the Court in fact remained silent.<sup>225</sup> The *Kincaid* court offers no explanation for either reading.

Like the Sixth Circuit, the Ninth and Eleventh Circuits added a viewpoint-neutrality requirement to *Hazelwood*.<sup>226</sup> Both the *Planned Parenthood* and *Searcey* courts cite to the U. S. Supreme Court's opinion in *Cornelius v. NAACP* as the rule governing speech regulation in nonpublic forums.<sup>227</sup> Under *Cornelius*, regulation of speech in a nonpublic forum must be reasonable and viewpoint-neutral.<sup>228</sup> However, *Cornelius* involved access to federal offices for fundraising purposes<sup>229</sup> and the case did not implicate the unique concerns associated with public schools. Consequently, *Cornelius* is inapplicable to the circumstances in *Planned Parenthood* or *Searcey*. Despite the fact that *Cornelius* did not involve public schools, the Ninth Circuit adopted its rule in the public school context in *Planned Parenthood* without acknowledging the possibility that the Supreme Court intended to exempt school-sponsored forums from the viewpoint-neutrality requirement.<sup>230</sup> Similarly, in *Searcey*, the Eleventh Circuit interpreted *Hazelwood* as consistent with the *Cornelius* rule.<sup>231</sup> Yet the fact that *Hazelwood's* holding overlaps with half of *Cornelius'* traditional analysis does not explain the omission of the other half of the traditional rule from the *Hazelwood* opinion. *Cornelius* required reasonableness and viewpoint-neutrality;<sup>232</sup> *Hazelwood* required only reasonableness.<sup>233</sup>

The Eleventh Circuit expressed reluctance to abrogate viewpoint-neutrality, a fundamental tenet of First Amendment law, without explicit

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224. *Hazelwood*, 484 U.S. at 270.

225. *Id.*

226. See *supra* notes 173, 182 and accompanying text.

227. See *supra* notes 169, 173 and accompanying text.

228. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

229. *Id.* at 790.

230. *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991).

231. *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989).

232. *Cornelius*, 473 U.S. at 806.

233. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

direction from the U.S. Supreme Court.<sup>234</sup> Viewpoint-neutrality is a predictable indicator of First Amendment violations,<sup>235</sup> and wholesale elimination of such a requirement would follow only from a clear directive. However, the Eleventh Circuit overestimated the scope of the issue before it: exempting public schools from the viewpoint-neutrality requirement leaves the traditional requirements for regulation of speech in any other public forum in place.<sup>236</sup> Permitting public schools to make viewpoint-based decisions carves out a single, discrete exception to the public forum doctrine in recognition of the hybrid role of the public school as an instrument of the state, and a custodian of children in loco parentis.<sup>237</sup> It would hardly represent a major overhaul of First Amendment law.<sup>238</sup> Further, the Supreme Court fully understood the public forum doctrine—each of its three manifestations had been explained and applied prior to the 1988 *Hazelwood* opinion.<sup>239</sup> Although the *Hazelwood* Court's omission of the viewpoint-neutrality requirement remains mysterious, it was unlikely to have been mere oversight.

Given the importance of viewpoint-neutrality to First Amendment jurisprudence, the Sixth, Ninth and Eleventh Circuits' speech-protective reading of *Hazelwood* is not surprising.<sup>240</sup> However, only the Eleventh Circuit entertained the possibility of the alternative, legitimate interpretation advanced by the First and Third Circuits.<sup>241</sup> The *Kincaid*, *Planned Parenthood*, and *Searcey* courts could have reached the same result by interpreting *Hazelwood* as having abrogated the viewpoint-neutrality requirement in school-sponsored nonpublic forums. In *Kincaid*, the yearbook suffered from layout and design flaws, which could be remedied by reasonable, content-based restrictions unrelated to any viewpoint. Similarly, without engaging in a viewpoint analysis, the *Planned Parenthood* court could have held that a school may choose not to sponsor controversial speech. Finally, the *Searcey* court could have

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234. *Searcey*, 888 F.2d at 1319 n.7, 1325.

235. See Chernerinsky, *supra* note 18, at 56.

236. *Searcey*, 888 F.2d at 1325.

237. See *supra* notes 61–70 and accompanying text.

238. See *supra* Part I.B.

239. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799–806 (1985); *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981); *S.E. Promotions Ltd. v. Conrad*, 420 U.S. 546, 555–56 (1975); *Greer v. Spock*, 424 U.S. 828, 835–38 (1976).

240. See Chernerinsky, *supra* note 18, at 56 (“The determination of whether a law is viewpoint based is thus crucial in determining its constitutionality.”).

241. *Searcey*, 888 F.2d at 1319.

used *Hazelwood's* "reasonableness" requirement<sup>242</sup> to justify its conclusion that all Career Day presenters could offer informative disadvantages of other careers, a standard that provides adequate protection without the inflexibility of the viewpoint label.<sup>243</sup>

In sum, without an explicit directive from the U.S. Supreme Court, the *Kincaid*, *Planned Parenthood*, and *Searcey* courts introduced a viewpoint-neutrality requirement into the *Hazelwood* holding. The courts did not ground this interpretation in the text of the *Hazelwood* opinion, and failed to acknowledge that unlike other nonpublic forums, public schools must advance an educational objective. Adherence to a particular pedagogy may thus require the school to foreclose speech in its own forums when the content may be attributable to the school itself. Elimination of the viewpoint-neutrality requirement in this context would not compromise its vitality in other public forums.

C. *Eliminating the Viewpoint-Neutrality Requirement in Public Schools Avoids the Doctrinal Confusion Associated with the Content and Viewpoint Labels*

Since the idea of viewpoint discrimination was introduced in 1939,<sup>244</sup> the U.S. Supreme Court has explained that all viewpoint discrimination is a form of content discrimination.<sup>245</sup> Conversely, all content discrimination is *not* viewpoint discrimination.<sup>246</sup> What remains unclear is the point at which a discriminatory act crosses the line between regulation of subject matter and suppresses an idea, opinion or particular perspective.<sup>247</sup> Is birth control a topic or an opinion? An adamant anti-abortionist would argue that the entire subject represents a pro-choice viewpoint, yet the *Planned Parenthood* court considered the school district's policy against advertising birth-control related products or information a viewpoint-neutral content restriction.<sup>248</sup> Regulation of major philosophies also raises questions of whether a certain prohibition

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242. See Brian S. Black, *The Public School: Beyond the Fringes of Public Forum Analysis?*, 36 VILL. L. REV. 831, 871-73 (1991).

243. See *infra* Part IV.C.

244. *Hague v. CIO*, 307 U.S. 496, 516 (1939) (striking an ordinance controlling issuance of speech permits because the city officials would be allowed discretion to arbitrarily suppress "free expression of views on national affairs").

245. See *supra* Part I.A.

246. See *supra* Part I.A.

247. See *supra* Part I.A.

248. 941 F.2d 817, 829 (1991).

is viewpoint-neutral or viewpoint-based.<sup>249</sup> For example, banning all religious speech may be considered viewpoint-neutral because no particular religion is excluded in favor of another, or viewpoint-based because religious speech in general is prohibited in favor of secular speech. In situations like these, the distinction between content and viewpoint becomes illusory and artificial.

The viewpoint label is more of a hindrance than a tool, largely due to its uncertain relationship to the concept of content discrimination.<sup>250</sup> Because the Supreme Court has invalidated every law it deems viewpoint-based,<sup>251</sup> the Court now needs to explain why any content-based law is not viewpoint-based in order to uphold it. This has led to bizarre rationalizations such as those in *Boos*, *Finley*, and *Forbes*, in which arguably viewpoint-based regulations were characterized as viewpoint-neutral.<sup>252</sup> Particularly in the narrow context of nonpublic forums in public schools, the viewpoint label unnecessarily binds courts without offering additional analytical capacity. Courts already have ample authority to invalidate laws aimed at suppressing a particular viewpoint under the rules governing content.<sup>253</sup> They must strike down content-based laws that lack a compelling government interest or are not the least restrictive means of achieving that interest.<sup>254</sup> Under this standard, courts could uphold school regulations properly designed to promote values necessary for the maintenance of a democratic society, even when those actions discriminate based on viewpoint, but could invalidate laws intended to suppress a disfavored idea that lack a compelling government interest (such as a legitimate pedagogical concern).

To summarize, the distinction between content and viewpoint is both artificial and unnecessary. The Sixth, Ninth, and Eleventh Circuits' interpretation of *Hazelwood* perpetuates the struggle to define the point at which the content of speech becomes viewpoint, while the First and Third Circuits' approach obviates that inquiry.<sup>255</sup> If schools are not

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249. See *supra* notes 43–57 and accompanying text.

250. See *supra* notes 34–60 and accompanying text; see also Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 99–115 (1996), for a discussion of the history of content- and viewpoint-neutrality analysis. This Comment's critique of the viewpoint/content distinction is limited to the context of public schools.

251. Chemerinsky, *supra* note 18, at 56.

252. See *supra* notes 47–57 and accompanying text.

253. See *supra* notes 22–24 and accompanying text.

254. See *supra* notes 22–24 and accompanying text.

255. See *supra* note 186 and accompanying text.

required to maintain viewpoint-neutrality when regulating speech in school-sponsored forums, courts will not have to answer theoretical questions such as whether advertisements for birth control products represent a topic or a viewpoint. Finally, eliminating the distinction between content and viewpoint in this limited context offers a clearer standard for schools and courts: schools may reasonably regulate speech in school-sponsored forums based on legitimate pedagogical concerns, without worrying that an apparently permissible, content-based rule actually implicates a viewpoint and thus violates the First Amendment.

*D. Requiring Schools to be Viewpoint-Neutral when Regulating School-Sponsored Speech would be Inconsistent with the Approved Authority of Local Administrators to Transmit Community Values*

U.S. Supreme Court jurisprudence limits judicial intervention into school administration to matters that implicate constitutional rights and recognizes the school's ability to instill values as long as they do not impose a "pall of orthodoxy" over the classroom.<sup>256</sup> Therefore, inculcation of values or viewpoints cannot per se violate the First Amendment in the public school context.<sup>257</sup> The well-established tradition of deference to local authorities also clashes with a requirement that educational decisions be viewpoint-neutral and promote no position to the exclusion of its counterpoint.<sup>258</sup> A realistic understanding of the role of schools administrators and school boards makes it clear that viewpoint-neutrality is not only impractical, but impossible in many circumstances.<sup>259</sup>

The Court has never prohibited school administrators from promoting a particular viewpoint, provided that the regulation is not intended to suppress ideas and does not compromise other constitutional rights.<sup>260</sup> On the contrary, the court has allowed school boards to freely transmit social, moral, or political values.<sup>261</sup> If a school may advance a viewpoint through textbook and curriculum selection,<sup>262</sup> it is inconsistent to require it to sponsor and thus endorse speech which undermines its educational

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256. See *supra* note 103; see also notes 61–120 and accompanying text.

257. See *supra* notes 61–120 and accompanying text.

258. See *supra* notes 61–101 and accompanying text.

259. See *Diamond*, *supra* note 61, at 497; see also Bitensky, *supra* note 73, at 778.

260. See *supra* notes 61–120 and accompanying text.

261. See *supra* notes 61–101 and accompanying text.

262. See *supra* notes 61–101 and accompanying text.

goals. Given that viewpoints often represent values, the Court has never expected school boards to offer a truly viewpoint-neutral education in order to comply with the First Amendment.<sup>263</sup> Why, then, must a school maintain viewpoint-neutrality when sponsoring a forum and effectively signing its name to the message presented therein?

Requiring schools administrators to be viewpoint-neutral would paralyze them, because the decisions they make each day necessarily implicate viewpoint. For example, the viewpoints of school boards and legislators influence curriculum and textbook selection.<sup>264</sup> In the 1980's, an Oregon statute required history textbooks to "stress the services rendered by those who achieved our national independence," and banned any text speaking "slightingly of the founders of the republic."<sup>265</sup> Even statutes more innocuous than this reflect a viewpoint bias: for example, a Washington statute requires AIDS education, but limits discussion to the dangers, spread and prevention of the disease.<sup>266</sup> Acceptable as these perspectives may sound, a parent who believes that discussion of sexuality is altogether inappropriate in the school setting or that discussion of AIDS should extend beyond the dangers, spread and prevention of the disease holds a different viewpoint.

Because the public school tradition has been one of "[v]alue inculcation, rather than value neutrality,"<sup>267</sup> viewpoint bias inheres in the institution. Even if true viewpoint-neutrality were possible, its desirability must be seriously questioned.<sup>268</sup> Rather than tying the hands of legislators, schools boards and school administrators by imposing a requirement fundamentally inconsistent with the goal of public education, elimination of the viewpoint-neutrality requirement in public school nonpublic forums allows schools to continue pursuing appropriate pedagogical goals.

#### *E. Hazelwood Adequately Protects Students' First Amendment Freedoms*

*Hazelwood's* replacement of the public forum analysis with a mere "reasonableness" test in public schools could be criticized as too

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263. See *supra* notes 61–101 and accompanying text.

264. See Diamond, *supra* note 61, at 506 n.130.

265. OR. REV. STAT. § 337.260 (1981).

266. WASH. REV. CODE § 28A.230.070(1) (2002).

267. Diamond, *supra* note 61, at 499.

268. See *supra* note 1 and accompanying text.

compromising of students' rights.<sup>269</sup> Granted, the idea of empowering a school to discriminate based on viewpoint conjures images of racist, homophobic, or regressive school boards cleansing theaters, newspapers, and other programs of all but the most mainstream perspectives. But the First and Third Circuits' interpretation of *Hazelwood* does not give school boards an unconditional green light. The Court's requirement that the school's actions be "reasonably related to legitimate pedagogical concerns" imposes a limitation beyond mere reasonableness, for not all pedagogical concerns are in fact legitimate.<sup>270</sup> Even in the context of curriculum, the Court has not suggested that suppression of disfavored ideas would qualify as a "legitimate pedagogical concern."<sup>271</sup>

One might argue that viewpoint-based values inculcation enables a community to suppress minority viewpoints, and that without a viewpoint-neutrality requirement, even a slim majority could become tyrannous. For example, a school board may wish to allow publication of an article discussing the negative effects of being adopted by gay parents but refuse to run an advertisement for a gay pride rally. While this appears to be a problematic result, note that a viewpoint-neutrality requirement would prevent a school from excluding an article on the Biblical condemnation of homosexuals if it publishes an article urging tolerance. Further, parents who find the community values unacceptable may send their child to a private school or educate them at home. Finally, the scope of *Hazelwood* is rather small in comparison to the overall authority of school administrators to indoctrinate values.<sup>272</sup> Allowing the school to decline sponsorship of speech inconsistent with its educational mission, limited by the requirement that such refusals must be reasonably related to legitimate pedagogical concerns, does not prevent the exercise of First Amendment rights in forums which do not bear the imprimatur of the school.<sup>273</sup> While any democratic system threatens tyranny of the

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269. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287–88 (1988) (Brennan, J., dissenting).

270. *Id.* at 273. For examples of "illegitimate" pedagogical concerns, see *Meyer v. Nebraska*, 262 U.S. 390 (1923) (overturning ban on teaching modern foreign languages in public schools); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding mandatory flag salute unconstitutional); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (overturning ban on teaching theory of evolution in public schools); and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (overturning ban on wearing black armbands in protest of the Vietnam War).

271. Heins, *supra* note 49, at 165.

272. See *supra* notes 61–120 and accompanying text.

273. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).



majority, the above factors combine to outweigh that risk in relation to speech sponsored by public schools.

By choosing to sponsor only one viewpoint in its forum, the school does not foreclose the student's right to express a viewpoint. Speech which is attributable to the individual falls outside the scope of *Hazelwood*, and thus, elimination of the viewpoint-neutrality requirement for regulation of speech in school-sponsored forums does not threaten an individual's right to express a viewpoint inconsistent with the school's educational mission.<sup>274</sup> One might argue that when the school's decisions *directly* implicate the individual's First Amendment right to express a viewpoint (as opposed to textbook selection or curriculum guidelines, which involve the ancillary right to *receive* information),<sup>275</sup> the school should be required to open the forum to both sides of the debate if it opens it to one. However, a student who wishes to advocate white supremacy remains free to publicize her opinion at school, short of *Tinker*'s "substantial disruption" standard.<sup>276</sup> Outside of school, the student may distribute pamphlets on the sidewalk,<sup>277</sup> organize a rally in the city park,<sup>278</sup> or even post a website.<sup>279</sup> The only forums denied to her by *Hazelwood* are those sponsored by the school itself.

## V. CONCLUSION

Courts should interpret *Hazelwood v. Kuhlmeier* as eliminating the viewpoint-neutrality requirement from nonpublic forums in public schools when administrators regulate speech for legitimate pedagogical reasons. The majority opinion omitted the viewpoint-neutrality requirement when applying the public forum analysis to the public school, and the dissenting opinion explicitly criticized the majority for

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274. *Id.* at 272-73.

275. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 866-68 (1982).

276. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

277. *See* Smith v. Collin, 436 U.S. 953, 953 (1978) (denying stay of lower court judgment striking ordinances prohibiting dissemination of materials designed to promote hatred and public demonstrations of persons wearing military-style uniforms).

278. *Id.*

279. The U.S. Supreme Court afforded full First Amendment protection to the Internet in *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Addressing student websites created off-campus, courts have used *Tinker*'s "substantial disruption" standard to assess the constitutionality of a school's regulation of student websites and have considered whether the student websites rise to the level of an unprotected threat of violence. *See, e.g.,* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

eliminating this fundamental principal. Because courts have consistently deferred to local school authorities in recognition of their dual character as agents of the state and the parent, and have endorsed the school's right to inculcate community viewpoints, requiring the school to sponsor certain viewpoints undermines its right to indoctrinate values through other means. Finally, elimination of the distinction between viewpoint and content in this limited context avoids the doctrinal confusion associated with the viewpoint and content labels without sacrificing individuals' First Amendment rights. Courts should therefore follow the interpretation advanced by the First and Third Circuits when analyzing public schools' restrictions of speech in school-sponsored forums.

